WHITE AND OTHERS v. SAYERS AND OTHERS.*

Supreme Court of Appeals: At Richmond.

November 19, 1903.

Absent, *Keith*, P., and *Buchanan*, J

1. CONTRACTS—*Construction.* In the construction of a written contract the whole instrument is to be considered; not any one provision only, but all its provisions; not the words merely in which they are expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties.
2. CONTRACTS—*Construction—Case in judgment—Agreement for interest in minerals—Coal—Duration of contract.* In the case in judgment three persons entered into a deed by which, after reciting that they severally owned different parcels of land and jointly owned other parcels upon some or all of which they had reason to suppose there were valuable minerals, and that it was their intention to explore these lands to ascertain the presence of such minerals, if they existed, and to work them if found in sufficient quantities and richness, they mutually conveyed to each other such interest in all such minerals as might be found on any or all of the lands conveyed as would make each of the parties thereto own in fee simple one undivided third of all such minerals. The parties mutually covenanted with each other to explore for minerals on the land, at their joint and equal cost, and if valuable minerals were found to work them at their joint costs—profits and losses to be borne by them equally. The only consideration for the deed was the mutual covenants contained in it. The deed also provided for the continuation of operations notwithstanding the death of one of the parties, and that neither party should sell, lease or otherwise dispose of his interest in the minerals without the consent in writing of the other two. At the time the deed was made, coal had practically no market value for want of transportation facilities, and did not have for nearly forty years thereafter, but it was believed that gold might be found on the land, and for a few years the parties did explore for gold or other valuable minerals, but finding none abandoned the undertaking and did nothing further under the deed or contract. No change took place in the possession of any of the lands. Nearly fifty years after the deed was made, this suit was brought by the survivor of the parties and others to remove the deed as a cloud upon the title to their land.

Held:

Coal was not within the contemplation of the parties, and hence is not covered by the word "minerals" used in the deed; and the deed was not intended to convey to each of the parties a fee simple in an

* Reported by M. P. Burks, State Reporter.

undivided one-third of the minerals on the lands, nor was the contract of the parties intended to be of indefinite duration. The parties merely intended to enter into a partnership agreement to explore for minerals and to work them if found in sufficient quantity and richness, which partnership was subsequently dissolved by abandonment of the undertaking.

Appeal from a decree of the Circuit Court of Tazewell county, pronounced December 23, 1901, in a suit in chancery wherein the appellees were the complainants, and the appellants were the defendants. *Affirmed.*

The opinion states the case.

Chapman & Gillespie and *Greever & Gillespie,* for the appellants.

Henry & Graham, for the appellees.

CARDWELL, J., delivered the opinion of the court.

This controversy arises out of the following contract in writing, signed by the parties named therein:

"This deed, tripartite, made and entered into this 3d day of August, 1854, between Kiah Harman, and Nancy B., his wife, of the first part, Elias V. Harman, and Sarah, his wife, of the second part, and Daniel H. Harman, and Susan, his wife, of the third part, all of the county of Tazewell and state of Virginia, witnesseth:

"That whereas the said parties own and claim upon the Dry Fork of Sandy, and its tributaries, in the county of Tazewell, certain parcels of land, some of which are owned by the said Kiah Harman, individually, some by the said Elias V. Harman, individually, and some by the said Daniel H. Harman, individually, some by Elias V. and Daniel H. Harman, jointly, and some by Kiah and Daniel H. Harman, jointly, and there is reason to suppose that upon some or all the said lands there are valuable minerals, and whereas it is the wish and intention of the parties to explore said lands to ascertain the presence of such minerals if they exist and to work them if found in sufficient quantities and of sufficient richness.

"Now therefore, in consideration of the premises and the mutual covenants in this deed, the parties hereto do mutually convey each to the other such interests to all such mineral as may be found upon any or all of such lands lying as aforesaid upon the waters of the Dry Fork of Sandy River, together with all such privileges of

access to and from said land, the use of wood, water and other material and privileges necessary to the proper working of minerals, should any be found, as will make each of the parties hereto own in fee simple one undivided third of all the minerals and privileges above mentioned upon all said lands.

"And the parties further covenant to proceed at their joint and equal expense to explore for minerals upon said lands and to work said minerals, also upon their joint and equal expenses, should valuable minerals be found in quantities sufficient to work: And all the clear profits arising therefrom are to be equally divided and all the losses equally borne. It is also further covenanted that neither party to this deed is to sell, lease or otherwise dispose of his interest to said minerals without the consent in writing of both the others and that in the event of the death of either the work is not to be suspended, but is to be prosecuted by the survivors for their benefit and for the benefit of the estate of the decedent."

The question to be considered is, what is the true construction and effect of this instrument?

Kiah Harman, Elias V. Harman and Daniel Harman, at the time the instrument was executed, owned contiguous lands, some individually and some jointly, lying then in the county of Tazewell, but a portion of which, by reason of the formation of McDowell county, partly from Tazewell, are now within the limits of McDowell county, West Virginia. This contract was admitted to record in the clerk's office of the County Court of Tazewell, as to the male parties thereto, on the 3d day of August, 1854, and was acknowledged by the wives on the 6th day of August, 1855, their acknowledgments being spread upon the record on the last mentioned date. Two of the parties to the contract, Kiah and Elias V. Harman, died many years before the institution of this suit, the first named in 1867, and the latter in 1877, and their respective rights under the contract, if any, are held or claimed by numerous parties.

The bill filed in December, 1901, by the appellees, the present claimants of the lands which Daniel H. Harman had title to when the contract in question was entered into, seeks to set aside and annul the contract, as a cloud upon their title, on the ground that the word "minerals" therein was not intended to embrace coal measures on the lands; that the mineral (gold), which was contemplated and sought, not being found in sufficient quantities to work, nothing passed by the contract, and that the contract, creat-

ing but a "project and partnership," was mutually abandoned and wholly given up by the parties in a year or two after it was executed.

On the other hand, appellants, defendants below, contend that by the contract each of the parties became the owner "in fee simple" of one undivided third of all the minerals and privileges mentioned in the contract, and the word "minerals" is to be construed as including coal and not gold alone.

The contract, upon its face, sets out no other consideration than the mutual covenants therein stated, and none other is suggested, except the contemplated profits to arise from working the minerals on the lands, which profits were to be equally divided between the parties, and all losses equally borne by them. After setting out that the parties have reason to suppose that upon some or all of their lands, just before mentioned, there are valuable minerals, which it is their wish and intention to explore for and work, if found to exist in sufficient quantities and of sufficient richness, they mutually convey to each other, not "a one undivided third of all the minerals" on said lands, but an interest in "all such minerals as may be found" upon the lands mentioned, together with "such privileges of access to and from the lands, the use of wood, water and other material and privileges necessary to the proper working of minerals, *should any be found,* as will make each of the parties hereto own in fee simple one undivided third of all the minerals and privileges above mentioned upon all said lands." To what minerals does the contract there refer to? Clearly to the minerals that *might be found* as the result of the explorations then contemplated by the parties. Can the instrument be construed as meaning that the parties intended to convey to each other an undivided one-third of all minerals that might at any indefinite period be found upon the lands? We think not. The language they employ is too plain to admit of doubt that the parties merely intended to enter into a partnership agreement, by which they were at their joint and equal expense to explore for minerals on their lands, and if, as the result of their investigations, any should be found of sufficient quantity and richness to justify their doing so, to work such mineral, the profits arising therefrom to be equally shared by the parties, and the losses, if any, to be equally borne by them.

It needs no citation of authority, that such an agreement does nothing more nor less than to create a partnership between the parties thereto, and that it was entirely competent for the parties

to abandon the contract and terminate the partnership whenever they mutually agreed to do so. It was, as the instrument discloses, purely a matter of conjecture as to whether there were minerals of value on the lands of the respective parties, or either of them, but, believing such to be the fact, it was manifestly their purpose to put in, each, the minerals that might be found on their respective lands, and bear an equal portion of the costs of exploring for them. and the costs of working such as might be found of sufficient value to justify it, looking alone, as a consideration for their in-put, to a share of the profits that it was hoped would arise out of the undertaking.

It was said by Lacy, J., in *Cowan* v. *Radford Iron Co.*, 83 Va. 547, and repeated in *Shen. L. &c. Co.* v. *Hise, supra,* with reference to construing contracts: "Regard should be had to the intention of the parties, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject matter of the agreement, the object which the parties had in view at the time and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be *unreasonable* or *unequal,* and that construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties." In the case at bar, the parties to the contract, as we have seen, never paid to each other one cent in money for the respective conveyances made by each to the other, but the sole consideration moving them to enter into the coveyance was the "clear profits arising" from the valuable minerals which they "supposed" were upon their respective lands, which they were to "explore" for and to work "if found in sufficient quantities and of sufficient richness." It is true they used the general term "minerals," but when regard is had to the situation of the parties, the subject matter of the agreement (the mining of minerals supposed to be on the lands of value), the object which the parties had in view at the time and intended to accomplish, as disclosed in the contract itself and by the evidence, a contention that the parties contemplated within that term coal, which at the time and for nearly forty years at least thereafter had no market value, would clearly be unreasonable and unjust. There was at that time a general excitement and interest all over the country relating to the discovery of gold, and the parties to this contract did actually prospect or "explore," pursuant to their contract, upon their lands

for "minerals," but upon their finding that gold in sufficient quantity and richness did not exist, they abandoned the undertaking and nothing more was heard of this contract for nearly a half century, during all of which time no change in the possession of the lands took place on account of the contract.

At that time coal on these lands was of no appreciable value, as there was no outlet for it to a market, and it was only within the past few years that it has become so. To suppose, in the light of all the surrounding circumstances, that these parties at the time contemplated exploring or prospecting for and working coal, seems too unreasonable to admit of discussion.

The abandonment of the contract, within a year or two after it was made, cannot be attributed to a change of parties in interest, for, besides the provision in the contract that "neither party to this deed is to sell, lease or otherwise dispose of his interest to said minerals without the consent in writing of both the others, and in the event of the death of either the work is not to be suspended, but is to be prosecuted by the survivors for their benefit and for the benefit of the estate of the decedent," all of the parties to the contract lived many years after the undertaking contemplated in the contract was abandoned, and one of them was living when this suit was instituted in 1901 and is a party plaintiff, asking the cancellation of the contract as a cloud upon the title to his lands.

It was well said by Gibson, C. J., *Schuykill Nav. Co.* v. *Moore,* 2 Whart. 447: "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it."

"In the construction of a contract the whole instrument is to be considered; not any one provision only, but all its provisions; not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties." *Miller* v. *Kephart,* 18 Gratt. 1.

Applying the foregoing well established rules of construction to the instrument here under consideration, leads irresistibly to the conclusions we have stated, and it becomes wholly unnecessary to review the numerous authorities cited in the elaborate and able argument of counsel as to what is meant and contemplated by the term "minerals."

Upon the whole case, we are of opinion that the decree appealed from, which sets aside, cancels and annuls the deed or contract in question and remits and restores the parties interested, whether as original owner, or by purchase, devise or descent, to the rights and ownership of the lands therein referred to, as held and owned by the original parties to the deed or contract at the time it was made, is plainly right and therefore should be affirmed. *Affirmed.*

EDITORIAL NOTE.—It will be noted that the court does not decide that coal is not a mineral, but only that in the making of the contract, it is not within the contemplation of the parties. As a matter of law, coal *is* a mineral. A mineral is a fossil or what is mined or dug out of the earth. The term is said to be derived from *minare*, signifying *ducere*, to lead or draw, with reference to subterranean passages. In its most enlarged sense, it may be described as comprising all the substances which now form or once formed part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. Water, petroleum and natural gas are also minerals, though they have been not inaptly called *ferae naturae*. In *Kier* v. *Peterson*, 41 Pa. 517, Woodward, J., concurring, goos so far as to say: "It (petroleum) is part of the land. It is land." And a grant of the land carries the minerals with it. *Hartwell* v. *Camman*, 10 N. J. Eq. 178. *Dunham* v. *Kirkpatrick*, 101 Pa. 36, was like the principal case in this: there was a reservation of "all timber suitable for sawing, also all minerals." The word "minerals" was held not to include petroleum, the evident intention of the parties and the *ordinary* meaning of the word overcoming the technical meaning.

The principal case went off upon a construction of the contract—a somewhat remarkable one, we may add—a "deed tripartite," by which the parties conveyed each to the other, not land, but their respective interests in all such minerals as may be found upon certain lands in which each had an interest. The contract was written a half century ago. We write better ones nowadays, calling them not deeds, but leases. They either devise, with metes and bounds, a tract "for the sole and only purpose of mining for" a specified mineral or minerals, or they grant the *right to mine for and obtain the mineral upon* all that tract etc., etc., and in either event for a term of years and as much longer as it is found in paying quantities. Then follow the obligations of the lessee: that he will commence operations within a certain time and prosecute them diligently; that in the event of finding the mineral in paying quantities, he will pay to the lessor a certain portion of the mineral, either of the gross yield, or, and more generally, of the refined product, as to the mode of ascertaining and estimating which, the lease is specific; that the lessee shall pay all taxes upon any increase in the assessed value assessed at the date of the lease; that upon failure for a definite time to commence operations or for a failure to continue them diligently for another named period, the lessee will release and surrender the tract or the right and that the lessor may re-enter and dispossess him, the lease thereby to become null and void. Then follow minor provisions as to rights of ingress and egress, prohibition of sinking shafts w thin certain distances of residences or other named points, etc., etc.

The principal case might with entire propriety have been affirmed upon the technical ground of *abandonment*. An abandonment by the tenant of demised premises is, generally speaking, such a relinquishment as amounts to an implied surrender, and justifies an immediate resumption of possession by the landlord—an entire dereliction of the possession and occupancy of the property. From the standpoint of mining law, and more especially from the petroleum, a leading case is that of *Venture Oil Co.* v. *Fretts*, 152 Pa. 451, holding that abandonment before even the end of the term worked a forfeiture of the lease. Said the court: "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee; and his title, whatever it is, ends when the unsuccessful search is abandoned." Approved in *Crawford* v. *Ritchie* (W. Va.), 27 S. E. 220. In *Elk Fork Gas Co.* v. *Jennings*, 84 Fed. 839, Judge Goff, after stating the facts, said: "Both public and private interests require that such facts as are disclosed by the testimony in these cases should be held by a court of equity to constitute abandonment of the leases involved, *because of non-development*. It should be kept in mind that Johnson in all these leases was the party who was to take the initiative. He was the actor who was to commence development and make the search on all the land described in them. This he, for reasons of his own, so far as these particular leases were concerned, failed to do from 1880 to 1897. He now asks a court of equity, after such unreasonable delay on his part, and gross neglect of his implied duty, and after there has been a material change in the situation, brought about by the efforts of others in interest, to decree that he is entitled to the possession of the property he has abandoned. To so decree would not only be unconscionable, but it would retard the development of the country, and at the same time it would reward those who have been negligent, and punish those who have been prompt, in the discharge of their contract duties. See also *Skelsmith* v. *Gartlan*, 45 W. Va. 27.

In the principal case the law was even plainer. The parties to the contract had made no provision as to its life. They only agreed "to explore for minerals, . . . should valuable minerals be found in quantities sufficient to work"—*i. e.*, in paying quantities, to use the modern expression. But upon finding that such conditions did not exist, they abandoned the undertaking. Clearly, under the authorities, this, *ipso facto*, worked an end of the agreement, and the parties were restored to their original status. Such a "cloud" upon the title to the land was hardly worth the effort necessary to secure the dispelling influences of a court of equity. Even with the new conditions obtaining, namely, the possible presence of coal, if not of gold, upon the land, he would have been a bold man to have paid more than a nominal sum for such a title, for it was a dead thing. The mining history of this country and the law that has accompanied its growth show here and there, it is true, instances of fortunes made out of slender titles—sometimes mere squatters' titles. But these have been generally based upon, first, possession, and, second, the fact that the claimant could not prove, in the happy-go-lucky land-laws and customs of such times and localities, a *better* title. The demands of both courts and real estate markets for many years past have been insistent for as good a title by deed or lease, reinforced, in

the case of the latter, by substantial compliance with all its terms, as if the property were in the heart of a city, selling by the front foot. The law was well summarized by Judge Goff, as he is quoted above—that to decree in favor of a claimant under an abandoned mining lease would not only be unconscionable, but would retard the development of the country by the recognition, or interpolation, of the ghosts of dead titles and the consequent intimidation of *bona fide* investors.

SCHRECKHISE v. WISEMAN.*

Supreme Court of Appeals: At Richmond.

November 19, 1903.

Absent, *Buchanan, J.*

1. DEEDS—*Delivery to third person for grantee—Right to recall—Subsequent deed by grantor—Notice to second grantee.* A deed need not be delivered to the grantee in person in order to be effectual. If delivered to a third person unconditionally, and without reservation of any kind, with direction to deliver to the grantee after the death of the grantor, the delivery is effectual to pass title to the grantee, and the grantor cannot recall it. A subsequent deed to another grantee who has full knowledge of the facts will be null and void as to the first grantee. Notice to an agent to negotiate a transaction and procure a deed is notice to his principal.

Appeal from a decree of the Circuit Court of Augusta county, pronounced June 13, 1902, in a suit in chancery wherein the appellee was the complainant, and the appellant and others were the defendants. *Affirmed.*

The opinion states the case.

J., J. L., & R. Bumgardner and *Harry H. Blease,* for the appellant.

Curry & Glenn, for the appellee.

CARDWELL, J., delivered the opinion of the court.

In the latter part of 1898, Richard F. Humphreys, the father of appellee, Susan E. Wiseman, was the owner of a tract of about 15 acres of land in Augusta county, and being desirous of dividing it equally among his five children, including appellee, reserving to himself a life estate therein, caused it to be platted and divided into five lots of three acres each by J. Samuel Schreckhise, and Schreckhise prepared four deeds, which were at once executed by

*Reported by M. P. Burks, State Reporter.